

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

**[CORAM: ODOKI,CJ., ODER, TSEKOOKO, KAROKORA
AND KANYEIHAMBA, JJ.S.C]**

CIVIL APPEAL No. 5 OF 2 004

BETWEEN

BEATRICE KOBUSINGYE

APPELLANT

AND

1. FIONA NYAKANA]

.....

RESPONDENTS

2.GEORGE NYAKANA]

***[An Appeal from the ruling of the Court of Appeal at
Kampala (Okello, Twinomujuni and Kitumba, JJ.A)
dated 12th April, 2001 in Civil Appeal No.29/2000]***

JUDGMENT OF TSEKOOKO, JSC:

This appeal arises from an interlocutory ruling by the Court of Appeal rejecting an objection to the competence of two of the

grounds of appeal in that Court. This judgment, I will make observations about the competence of this appeal in view of the provisions of S.6(2) of the Judicature Act.

Third appeals to this Court are governed by S.6(2) of the Judicature Act which states:

"6(2) where an appeal emanates from a judgment or order of a Chief Magistrate or a Magistrate Grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the matter concerns a matter or matters of law of great public or general importance, or if the Supreme Court considers in its over all duty to see that justice is done, that the appeal should be heard."

This obviously means that this "appeal" has no jurisdictional foundation. As we recently stated in the UNEB case of **Uganda National Examinations Boards' Vs Mpora General Contractors**, (Civil Application No.19 of 2004), there is no right of appeal to this Court originating from interlocutory orders of the Court of Appeal which orders are incidental to the appeal but not resulting from the final determination of the appeal itself. Here the Court of Appeal has not determined the appeal yet. It follows that the Court of Appeal erred in giving the certificate for the appellant to lodge this appeal. This Court noticed this anomaly when the so

called appeal was pending judgment. Normally we would have asked parties to address us before making a final decision. However in view of the clear provisions of sub sec. (2) (supra), and of our recent decision in the UNEB case (supra) , it is unnecessary to hear parties on it. This appeal is therefore incompetent and ought to be struck out. However because an illegality (namely the view held by the Court of Appeal to the effect that old section 74 and 75 of the Civil Procedure Act do not apply to that court) has been drawn to our attention we have to correct that illegality. See **Mukula International Vs H.E, Cardinal Nsubuga** (1982)HCB 11. For the sake of clarity I shall start by outlining the back ground to this matter.

The two respondents instituted in the Chief Magistrate's Court, Fort Portal, a suit against the appellant, claiming damages for malicious prosecution and false imprisonment. A Magistrate Grade I who tried the suit dismissed it because it "was improperly brought before the court." The respondents unsuccessfully appealed to the High Court against the decision of the Magistrate Grade I. The respondents launched a second appeal to the Court of Appeal. There were four grounds in the memorandum of the appeal to that Court. The first two ground to which objection was unsuccessfully made in the Court of Appeal were formulated in the following way:

- 1. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on**

appeal and therefore came to a wrong conclusion that the report of the respondent to the police was not made with malice.

2. The learned trial judge erred in law and fact when he seemed to hold that the appellants had failed to prove malicious prosecution by the respondent. (The Court of Appeal reproduced, in its ruling, ground 3 instead of ground 2).

When the appeal was called up for hearing in the Court of Appeal on 27/3/2001, Mr. Tibaijuka representing the respondent there (and now the appellant) raised a preliminary point of law in respect of the above quoted two grounds that both the trial Magistrate Grade 1 and the High Court judge as a first appellate court made concurring findings that there was no malice on the part of the respondent and that, therefore, the Court of Appeal being now a second appellate court had no jurisdiction to reopen the matter. In support of his arguments he cited a number of authorities including **Ephrain Ongom Odongo Vs Francis Renega Bonge** S.ct Civil Appeal No.10/87 (unreported) and **Francis Sembuya Vs Allports Services (U) Ltd** Civil Appeal No.6 of 1995 S.Ct (unreported) as well as Rule 31 (2) of the Rules of the Court of Appeal. According to counsel, Subrule (2) would not allow that Court to circumvent the restrictions imposed by the former S.74 and S.75 of the **Civil Procedure Act** (CPA), which sections gave that Court jurisdiction. He argued that the Court of Appeal did not have the

equivalent of the old S.7 of the Judicature Act which would allow court to reopen the case. (S.7 which is now S.6 is concerned with the appellate jurisdiction of this Court in civil cases).

Mr. Babigumira for the appellants (current respondents here) took the contrary view and distinguished the authorities cited in the Court of Appeal by Mr. Tibaijuka. In his view the old S.11 of the **Judicature Act** and Rule 31(2) give the Court of Appeal power in second appeals. Alternatively he argued that where a first appellate court fails in its duty to appraise evidence and arrives at a wrong inference, the Court of Appeal has power under the old S.74 and S.75 of CPA to consider the matter because in that event errors of the first appellate court becomes errors as a matter of Law. In effect this means that Mr. Babigumira conceded that the two sections confer jurisdiction on the Court of Appeal.

The Court of Appeal accepted Mr. Babigumara's arguments and held that the old S.11 of Judicature Act gave that court wide powers to hear appeals and so the court overruled the objection. The present appellant as a respondent in the Court of Appeal was dissatisfied with the ruling of the Court. So she sought and was granted leave by the Court of Appeal to appeal to this Court on the ground that the appeal involves matters of law of great public and general importance.

The ground which brings out the illegality which this Court has to correct is formulated in these words: **The learned Justices and**

Lady Justice of Appeal erred in Law, in that they wrongly held that:

(a) The erstwhile sections 74 and 75 (now section 72 and 74) of the Civil Procedure Act are not applicable to the Court of Appeal.

(b) Section 11 of the Judicature statute 1996 (now 5.10 of the Judicature Act is wider than

section 5 (now section 4) thereof.

(c) They had jurisdiction over grounds 1 and 2 of the appeal before them.

After considering the arguments of both sides and pausing the question whether the old sections 74 and 75 apply to this Court, the Court of Appeal in its ruling stated this-

5.11 on the other hand is wider. It gives the Court of Appeal jurisdiction over the decisions of the High Court irrespective of whether it is original or appellate decision.

As Mr. Babigumira submitted it makes no distinction between the original and appellate decision of the High Court. In exercise of its jurisdiction as a second appellate court however, the Court of

Appeal is mandated by rule 31(2) of the Rules of this Court to-

"have power to appraise the inference of fact drawn by the trial Court."

The Court of Appeal concluded that in view of the provision of the old S.11 of the Judicature Act and Rule 31 (2) of the Court's Rules, the old sections 74 and 75 of CP Act are not applicable to it (Court) . In effect the Court held that if the two sections applied, the Court would have had no jurisdiction to hear submissions on the two Grounds which I have already reproduced in this judgment. For the sake of clarity and relevancy, I shall continue to refer to the old Ss.74 and 75 of the CPA and to the old Ss.11 and 12 of the **Judicature Act**. This is because the Court of Appeal delivered its ruling before the renumbering of those sections was made and published in the 2 000 Revision of the Laws of Uganda.

In lengthy written submissions, Mr. Tibaijuka has criticised the Court of Appeal for its ruling. He contended that that court has in the past made conflicting decisions concerning whether or not firstly the whole Civil Procedure Act applies to the Court of Appeal. According to learned counsel, the conflict arises because of the provisions of section 1 of Civil Procedure Act which reads:

" This Act shall extend to proceedings in the High Court and Magistrates Court."

In their reply Messrs Babigumira & Co., Advocates for the respondent, argued that because of this provision the Civil Procedure Act only applies to the High Court and Magistrates Court.

Learned counsel argued further that S.74 and S. 75 do not apply to the Court of Appeal in hearing second appeals. I think that this is a departure from his (counsel's) concession in the Court of Appeal.

With respect, I cannot appreciate the true cause of misunderstanding concerning the applicability of the provisions of the Civil Procedure Act or its Ss.74 and 75. Nor is there a sound basis for the view that the Civil Procedure Act can not apply to the Court of Appeal especially in the light of the provisions of the S.11 of the Judicature Act to which I shall revert later.

It is clear from the head note to the Civil Procedure Act that the Act was enacted to make provision for **PROCEDURE IN CIVIL COURTS.**

The jurisdiction of this Court and the Court of Appeal includes civil jurisdiction. I find nothing in S.1 of the Act which prohibits, in appropriate instances, the application of the provisions of the Act to procedure in either this Court or in the Court of Appeal. In my view, the operation of the Civil Procedure Act must be placed alongside the operation of the Judicature Act and the Constitution.

There is no need to go into the detailed history of appellate jurisdiction in Uganda. It suffices to say that between 1967 and 1996, the appellate jurisdiction of the then Court of Appeal for Uganda (subsequently renamed the Supreme Court) was governed partly by the Constitution of 1967 and partly by the Judicature Act of 1967 (S.40) as amended from time to time and the Civil Procedure Act (old Ss.68, 72, 74, 75) . In so far as second appeals (like the present appeal) were concerned, the relevant section was the old S. 74 (which is now S.72) of the CPA.

Now according to clause (2) of Article 134 of the current constitution,

"An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law".

This provision is a re-enactment of clause (2) of Article 89 of the 1967 Constitution as amended by statute 11 of 1987.

The two clauses [(2) of Art. 89 of the 1967 Constitution and (2) of Article 134 of the current Constitution)] show that appellate jurisdiction of the Court of Appeal is conferred by statute. To appreciate the current appellate jurisdiction of the Court of Appeal, it is perhaps necessary to go back a little. As I said⁵before 1996, the principal statutes conferring appellate jurisdiction to the Supreme Court as a Court of Appeal in civil causes were the Judicature Act, 1967 and the Civil Procedure Act.

By S.40 of the Judicature Act, 1967 as amended in 1987-

"(1) The Supreme Court shall be a superior Court of record in and for Uganda and shall have such appellate and other jurisdiction as may be conferred upon it under any written law.

(2) For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested in the High Court under any written law."

Subsection (1) operationalised clause (2) of Article 89 by reproducing it. That is to say it put into effect the purpose of that Article. The reference to any written law in subsection (2) of S.40 must surely be a reference to, inter alia, the **Civil Procedure Act** which is definitely the written principal law regulating the conduct of civil matters by the High Court.

Clause (2) **of Article 89** of the old Constitution and subsection (1) of section 40 of the 1967 **Judicature Act** as amended in 1987 stated that the Supreme Court was to exercise appellate jurisdiction conferred by any written law. As far as I am aware, prior to 1996, the only written principal law which conferred upon the Supreme Court appellate jurisdiction in civil matters in second

appeals was the old section 74 of the **Civil Procedure Act**. The Supreme Court's procedure was regulated by the Court of Appeal for East Africa Rules, 1972 which in 1977 were adopted (see Decree No.20 of 1977) for use by our Court of Appeal. In 1987 the **Judicature Act (Amendment) Statute 1987** (Statute 12 of 1987) renamed the then Court of Appeal for Uganda as the Supreme Court. Accordingly the words "**Supreme Court**" replaced the words "**Court of Appeal**" wherever those words appeared in S. 74 of the Civil Procedure Act. This remained the position until the present Court of Appeal was created by the 1995 Constitution which conferred on the same Court of Appeal jurisdiction under clause (2) of Article 134 (supra) . In order to operationalise the said clause (2), of Article 134, in 1996, the National Resistance Council as a legislative organ, passed the Judicature Statute, 1996 (now Cap. 13 of Laws of Uganda) and in S.11 (now 10) the NRC operationalised the appellate jurisdiction of the Court of Appeal by stating that-

"An appeal shall lie to the Court of Appeal from the decisions of the High Court prescribed by the Constitution, this statute and any other law"(underling supplied).

In that form the section confers jurisdiction on the Court of Appeal in general terms. That jurisdiction relates to both criminal and civil and regardless of whether it is first, a second or third appeal. The details of the jurisdiction so conferred were left to be spelt out by "**any other law**". In the case of criminal appellate

jurisdiction, it is the **Trial on Indictments Decree and the Criminal Procedure Act**, which were the principal laws applicable. The procedure regulating management of criminal appeals is set out in the relevant parts of the **Court of Appeal Rules, 1996**.

I should point out that when the NRC passed the **Judicature Act**, it recognised that the Court of Appeal had assumed the previous appellate functions of the old Supreme Court. And so the NRC provided by (S.14) now section 13 of the Judicature Act, that-

"Subject to the constitution, and with effect from the commencement of the constitution, any reference to the Supreme Court, in any enactment in force immediately before coming into force of the constitution shall be read as reference to the Court of Appeal."

Consequently the words "Supreme Court" which since 1987 appeared in the former S.74 (now section 72) of the **Civil Procedure Act** were replaced by the word "**Court of Appeal**." Thus whereas the old S.11 of the Judicature Act set out appellate jurisdiction of the Court of Appeal in general terms, it is the old sections 68, 74 and 74A of the **CP Act** which set out in detail the three classes of Appeals in ordinary-civil matters in that court. These classes are: first appeals from High Court exercising original jurisdiction. The second class of appeals was from

appellate decrees such as the appeal now pending in the Court of Appeal. This was governed by the old S.74. The third appeal is that one from Magistrates Grade II and it was governed by the old S.74A. There is of course the class of appeal under the old section 77 upon which I need not comment.

The Court of Appeal in its ruling mentions the old S.5 (now S.4) of the Judicature Act. I need only to say that the section (S.4) operationalised clause (2) **of Article 132 of 1995 Constitution** which confers general appellate jurisdiction on this Court. It does not specify the class of appeals and under what circumstances each class may be lodged. That is left to the new sections 5 and 6 of the same Act.

Therefore and with the greatest respect to the Court of Appeal it was an error for the court to hold that both the old S.74 and S75 (now sections 72 and 74) were not applicable to that Court. In away Mr. Tibaijuka arguments were correct. Further, these sections do not ordinarily govern appeals to this Court because, as I have just said, the appellate jurisdiction of this Court in both criminal and civil matters is clearly spelt out in detail in sections 5 and 6, respectively. The Act had to create these powers specifically for the new Supreme Court because such powers were non-existent in any other law of which I am aware. My views in **Allport Freight Services case** (supra) that Ss. 74 and 75 were inapplicable to the new Supreme Court and which view the

Court of Appeal relied on must be understood in this context. The rules of procedure such as rule 31 (2) of the Rules **of the Court of Appeal** relied on by the Court of Appeal do not by themselves create jurisdiction but merely provide procedure to regulate the exercise of the appellate jurisdiction conferred upon that Court.

I now return to the general applicability of the Civil Procedure Act. As I will explain, this is to be found in the old S. 12 (now S.11) of the Judicature Act. The section reads as under: -

"For the purpose of hearing and determining an appeal the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated"

The powers, authority and jurisdiction referred to are those of any trial court whose decisions are appealed up to the Court of Appeal. This provision vests in the Court of Appeal the same powers, authority and jurisdiction which, for instance in this case, the Grade I Magistrate exercised when he tried and determined the case. What this means is this. After the Court of Appeal has heard and reached its conclusions, in deciding the orders which the Court of Appeal can make the court is bound to make such orders that the trial Magistrate could have made in the case in accordance with law. If the trial Magistrate were to award damages the amount would be the figure within the jurisdiction conferred on him by the Magistrates Act. Obviously the Grade I

Magistrate in the conduct of the trial was regulated principally by the Civil Procedure Act and the Civil Procedure Rules in addition to the Magistrates Courts Act.

It follows that in making any orders which the trial Magistrate could make, the Court of Appeal will in effect be applying CPA, Civil Procedure Rules and the Magistrate Courts Act because those are the laws which give the trial Magistrate jurisdiction and powers. If the court decided to award damages, the damages would be such that the amount would not exceed what Magistrate's Act allows the trial Magistrate to award. In short section 11 makes it possible for the Court of Appeal to dispose of the case completely instead of returning it to a trial Magistrate to make the orders in conformity with decision of the Court of Appeal. The same is the case where the court determines an appeal from a decision of the High Court made in exercise of original jurisdiction. Obviously I am not dealing with cases where a retrial is ordered.

Accordingly I think that (a) and (b) of the ground of appeal properly drew to our attention the illegality which I have attempted to correct in this judgment.

In my considered view it is a misunderstanding and erroneous to infer that because in **All-Ports Freight Case** (Supra) and in other cases this Court indicated that both S.72 and S.74 do not apply to appeals in this Court, therefore, or similarly, those

sections do not apply to the Court of Appeal, The two sections are very clear. I have already explained in this judgment why the sections govern appeals in the Court of Appeal. It may not be so helpful to include cases not cited to us, but I would say that any decisions of the Court of Appeal in which that court held that the Civil Procedure Act as a whole or sections 72 and 74 thereof do not apply must have been wrongly decided and represent bad law.

There is the other aspect to the aborted appeal which the appellants' counsel argued to the effect that because sections 74 and 75 apply to the two grounds of appeal which I have already reproduced, therefore the Court of Appeal has no jurisdiction to hear argument thereon and determine them. I do not want to fetter the Court of Appeal on how it will decide the pending appeal, as it is yet to consider the merits of the appeal. I would, however, point out that the formulation of grounds of appeal in the

Court of Appeal are regulated not by S.74 but by Rule 65 (2) of the Rules of that court. Grounds or any of them may ordinarily be rejected if all or any of them offend that rule which reads:-

"The memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the POINTS

**OF LAW, OR OF MIXED LAW AND ACT, which are
alleged to have been wrongly decided "
(Underlining added).**

Generally, therefore, objection to any ground of appeal in the Court of Appeal can be based on these provisions.

Before concluding, I have an observation to make. Much as I appreciate that the points raised in the aborted appeal are important in that the same have enabled this Court to clarify the relevancy and applicability of CPA and especially, of the new Ss.72 and 74 of the CPA, the appellant should have allowed the appeal in the Court of Appeal to be heard and determined. She was free to oppose whatever she disagreed with in the appeal in the Court of Appeal and if the Court decided against her, she could then launch an appeal to this Court and include in that appeal questions relating to the applicability of the two sections. That way time would have been saved.

Although the court appreciates the fact that counsel for the appellant has through an aborted appeal drawn the attention of court to an error which has been corrected now, I do not think that the appellant should get any costs. I would therefore make no order as to costs in this matter.

JUDGMENT OF ODOKI, C.J.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC, and I agree with him that the appeal is incompetent and for the reasons he has given, should be struck out. I also agree with him that there should be no order as to costs.

As the other members of the court also agree, this appeal is struck out with no order as to costs in this court.

JUDGMENT OF ODER, JSC.

I have had the benefit of reading in draft the judgment of Tsekooko, JSC. I agree with him that the appeal is incompetent for the reasons he has given. It should be struck out with no order for costs.

JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgment prepared *by* my learned brother. Justice J.W.N. Tsekooko. JSC. and entirely agree with him that the appeal to this Court is incompetent as it emanated from an interlocutors order of Magistrate Grade I.

I further agree with him that the Court of Appeal ought not to have granted leave to Beatrice Kobusingye to appeal to this

Court as the purported appeal was emanating from an interlocutor, order. Section 6(2) of the Judicature Act. prohibits such appeal. It provides that:

"2" Where an appeal emanates from a judgment or order of a Chief Magistrate or a Magistrate Grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard."

In the result, the purported appeal is incompetent and must be struck out.

I accordingly adopt the orders proposed by my learned brother, Justice Tsekooko. JSC.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my brother, Tsekooko, JSC.

I agree with him that the appeal is incompetent and should be struck out with no order for costs.

Dated at Mengo, this 22nd day of February 2005.